1991

Rocky Mountain Thrift Stores Inc., et al. v. Salt Lake City Corporation et al. : Brief of Appellee

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

ROCKY MOUNTAIN THRIFT STORES INC., et al., Plaintiffs and Appellants; -vs- SALT LAKE CITY CORPORATION et al., Defendants and Appellees	Supreme Court No. 910471

BRIEF OF APPELLEE, SALT LAKE COUNTY

Appeal from the Third Judicial District Court of Salt Lake County

Honorable Judge Michael R. Murphy, Judge, Presiding

Wesley F. Sine
349 South 200 East, Suite 170
Salt Lake City, Utah 84111
Attorney for Appellants

Bruce R. Baird
Assistant Salt Lake City Attorney
Roger F. Cutler
Salt Lake City Attorney
451 South State Street, Suite 505
Salt Lake City, Utah 84111
Attorneys for Appellees, Salt Lake City Corporation, et al.

Anne Swensen
Snow, Christensen and Martineau
10 Exchange Place, Suite 1100
P.O. Box 45000
Salt Lake City, Utah 84111
Attorneys for Appellees, State of Utah, et al.

Kevan F. Smith
Deputy Salt Lake County Attorney
David E. Yocom
Salt Lake County Attorney
2001 South State Street
Suite S-3600
Salt Lake City, Utah 84190
Attorneys for Appellee, Salt Lake County

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROCKY MOUNTAIN THRIFT STORES INC., et al.,	:	
Plaintiffs and Appellants;	:	Supreme Court No. 910471
-vs-	:	
SALT LAKE CITY CORPORATION et al.,	:	
Defendants and Appellees	:	

BRIEF OF APPELLEE, SALT LAKE COUNTY

Appeal from the Third Judicial District Court of Salt Lake County

Honorable Judge Michael R. Murphy, Judge, Presiding

Wesley F. Sine
349 South 200 East, Suite 170
Salt Lake City, Utah 84111
Attorney for Appellants

Bruce R. Baird
Assistant Salt Lake City Attorney
Roger F. Cutler
Salt Lake City Attorney
451 South State Street, Suite 505
Salt Lake City, Utah 84111
Attorneys for Appellees, Salt Lake City Corporation, et al.

Anne Swensen
Snow, Christensen and Martineau
10 Exchange Place, Suite 1100
P.O. Box 45000
Salt Lake City, Utah 84111
Attorneys for Appellees, State of Utah, et al.

Kevan F. Smith
Deputy Salt Lake County Attorney
David E. Yocom
Salt Lake County Attorney
2001 South State Street
Suite S-3600
Salt Lake City, Utah 84190
Attorneys for Appellee, Salt Lake County

PARTIES

Parties to this case are as follows:

ROCKY MOUNTAIN THRIFT STORES, INC., a Utah corporation d/b/a HOPE OF AMERICA THRIFT STORE; SINE INVESTMENT, INC., d/b/a SCOTT'S TRAVEL MOTOR HOTELS; SITE, INC., d/b/a/ TEN PIN LOUNGE; RANCHO LANES, INC., d/b/a/ RANCHO 42 LANES RECREATION CENTER; JERRY SINE INVESTMENTS, a partnership d/b/a SE RANCHO MOTOR MOTEL; and STOCKHOLM RESTAURANT, INC.;

Plaintiffs and Appellants

vs.

SALT LAKE CITY CORPORATION, a Municipal Corporation of the State of Utah; SALT LAKE CITY MAYOR, TED WILSON; AL HAYNES, Assistant to Salt Lake City Mayor; CITY ENGINEER, MAX PETERSON; RICK JOHNSTON, Assistant City Engineer; STATE OF UTAH; SCOTT MATHESON, as Governor of the State of Utah; STATE COUNCIL OF DEFENSE; STATE ROAD COMMISSION; and SALT LAKE COUNTY, a body corporate and politic of the State of Utah;

Defendants and Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I Cases Page(s)

II Statutes and Rules Page(s)

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROCKY MOUNTAIN THRIFT STORES INC., et al.,	:	
Plaintiffs and Appellants;	:	
-vs-	:	Supreme Court No. 910471
SALT LAKE CITY CORPORATION, et al.,	:	
Defendants and Appellees.	:	

BRIEF OF APPELLEE, SALT LAKE COUNTY

STATEMENT OF JURISDICTION

This Court has jurisdiction of this matter on appeal under the provisions of Section 78-2-2, Utah Code, 1953 as amended; and Rule 3, Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Was summary judgment properly granted by the trial court upon the basis that defendants are immune from suit under the provisions of the Utah Governmental Immunity Act, Sec. 63-30-10(1)?

2. Was summary judgment properly granted by the trial court upon the basis that defendants are immune from suit under the provisions of the Utah Governmental Immunity Act, Sec. 63-30-10(4)?

3. Was summary judgment properly granted by the trial court upon the basis that, as a matter of law, plaintiffs failed to raise any genuine issues of fact requiring trial?

STANDARD OF APPELLATE REVIEW

In reviewing a summary judgment, this Court considers the record in the light most favorable to the party opposing the motion, City Consumer Services, Inc. v. Peters, 815 P.2d 234 (Utah 1991), resolving all doubt in his favor, Brigham Truck & Implement v. Fridal, 746 P.2d 1171 (Utah 1987). Because summary judgment presents for review only questions of law, this Court reviews the issues for correctness, affording no deference to the trial court. Town of Alta v. Ben Hame Corp., 836 P.2d 797 (Utah 1992). However, an appellate court applies the same standard as that applied by the trial court. City Consumer Services, supra.

DETERMINATIVE STATUTES AND RULES

Sections 63-30-10(1) and (4), Utah Code 1953 as amended (as in effect in 1983):

> Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of:
>
> (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
>
> . . .
>
> (4) a failure to make an inspection or by making an inadequate or negligent inspection;
>
> . . . .

Rule 56(c) and (e), Utah Rules of Civil Procedure:

> (c) The motion (for summary judgment) shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall

be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

. . .

(e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

. . . .

Rule 4-501(2), Utah Code of Judicial Administration:

(2) Motions for summary judgment.

(a) Memorandum in Support of Motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) Memorandum in Opposition to a Motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set

forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

STATEMENT OF THE CASE

A. Nature of the Case.

This case is based upon the complaint of Plaintiffs, Rocky Mountain Thrift Stores, et al. (RockyMtn), alleging negligence on the part of Defendants, Salt Lake City Corporation, State of Utah, Salt Lake County, et al. (Defts), in Defendants' efforts to control flood waters coursing down City Creek during the spring runoff floods of 1983. In their complaint, filed September 15, 1983, RockyMtn prayed for injunctive relief in their first cause of action. Said prayer soon became moot and no further proceedings were had in regard thereto. In their second cause of action, RockyMtn claimed (1) an unconstitutional taking of their private property for public purposes, without just compensation; (2) negligence by Defts in the design and maintenance of the City Creek conduit underlying North Temple Street in Salt Lake City which was the proximate cause of damage to RockyMtn; and (3) negligence by Defts in several instances during efforts to control the 1983 spring runoff flood within City Creek which was the proximate cause of damage to RockyMtn.

B. Course of Proceedings.

Following a period of discovery, RockyMtn's complaint was dismissed by Judge Philip R. Fishler on February 11, 1985, pursuant to motions for dismissal and/or summary judgment filed by each of

the defendants. An appeal of that dismissal was subsequently taken by RockyMtn to this Court. That appeal was heard as Case No. 20513, and the Court's decision was delivered on December 14, 1989. It is reported as Rocky Mountain Thrift Stores, Inc., et al. v. Salt Lake City Corporation, et al., 784 P. 2d 459 (Utah 1989). This Court upheld the trial court in ruling that RockyMtn had no cause of action for the taking of private property for public use without just compensation. It further held that Defts were immune from RockyMtn's allegations of negligence in the design and construction of the culvert for City Creek which underlay North Temple Street, because the decisions inherent in such design and construction were discretionary functions. This Court remanded the case to the District Court for development of additional evidence concerning RockyMtn's allegations of negligence in the inspection and maintenance of the culvert and in Defts' operations during their attempts to control the City Creek flood.

Following remand, the parties engaged in further discovery. Additional depositions were taken, i.e., those of Dale Edward Anderson, Merrill Norman, and Clark Lin. RockyMtn thereupon certified their readiness for trial. Thereafter, each defendant made motions for summary judgment. Said motions were supported by memoranda and supporting affidavits, as required by Rule 4-501(2)(a), Utah Code of Judicial Administration and Rule 56, Utah Rules of Civil Procedure. In his "Summary Decision and Order" filed September 4, 1991, Judge Michael R. Murphy granted Defts' motions for summary judgment, and on October 1, 1991, Judge Murphy

entered summary judgment in favor of Salt Lake City and Salt Lake County. This present appeal is taken from Judge Murphy's grant of summary judgment.

(The State of Utah and its individually named defendants were granted summary judgment earlier upon separate grounds. The issues related to that action of the District Court are addressed by those defendants.)

C. Statement of Uncontested Facts.

In order to avoid repetition in presentation of briefs, Salt Lake County adopts the statement of facts presented by Salt Lake City, with the following additions. This is done with the knowledge and consent of counsel for Salt Lake City.

1. With respect to paragraph 3 of City's Statement, Section 17-8-5, Utah Code, 1953 as amended, was enacted in 1947 to authorize counties to provide for the carrying away and safe disposal of natural storm and flood waters by utilization and regulation of the natural channels within the counties. (Judicial notice of statute and annotations.)

2. Additionally, with respect to paragraph 3 of City's Statement, Salt Lake County adopted its ordinance for flood control under the authority of said Sec. 17-8-5 in 1982, and published it as Ordinance 7-2-1, et seq., Revised Ordinances of Salt Lake County. Said ordinance is now codified as Section 17.08.010, et seq., Salt Lake County Code of Ordinances. (Judicial notice of provisions of ordinance and date of adoption.)

3. Salt Lake City is a Utah municipal corporation with the

requisite police power to provide for the health, safety and welfare of its citizens, and for the building and repairing of culverts, drains, and facilities necessary to proper drainage. (Secs. 10-8-38, 10-8-84, Utah Code, 1953 as amended.)

4. With respect to paragraph 6 of City's statement, the known historic peak flow of water through the City Creek conduit, at its outfall at the Jordan River, was 272 cubic feet per second, which occurred on September 26, 1982, at 11:00 a.m. (R. 1149, Mitckes affidavit, para. 5.)

5. Conduit maintenance includes the principle of "self-cleaning," which recognizes that water passing through the conduit clears the conduit as it passes. (R. 1149, Mitckes affidavit, para. 16.)

6. Following the thunderstorm of September, 1982, relatively little storm water drainage entered the City Creek conduit to leave behind sediment or debris because storms after that time would be in the form of snow, which did not melt until the following May. (R. 1149, Mitckes affidavit, para. 16.)

7. Salt Lake County relied upon the fact that the extremely high flows of water resulting from the thunderstorm in September, 1982 were carried successfully through the City Creek conduit to establish the fact that the conduit was clean and unobstructed in May, 1983. (R. 581, Holzworth deposition, pp. 14, 43-44.)

8. In addition to its reliance upon the capacity of the conduit to carry the waters of the 1982 September thunderstorm as proof that the conduit was clean and unobstructed, Salt Lake County

made further efforts to prepare the open channel portions of City Creek to carry the spring runoff in 1983 by cleaning debris from the creek bed upstream of Memory Grove and by dredging the Memory Grove pond to act as a debris settlement basin. (R. 581, Holzworth deposition, pp. 43-44.)

9. Stanley Butts, Salt Lake City foreman over drainage crews during 1983, visually inspected the North Temple conduit prior to the 1983 runoff by opening manholes between Memory Grove to 700 West and observed water flowing freely, with no apparent obstruction in the conduit. In addition to visual inspection, Mr. Butts inserted a metal rod into the flow and determined that only a few inches of silt and sand existed at the bottom of the conduit. (R. 1167, Butts affidavit, paras. 3-4.)

10. Thousands of tons, perhaps ten thousand tons of debris, consisting of rocks, gravel, and earth material, were brought down City Creek and into the conduit underlying North Temple during the spring runoff flood of 1983. Entire banks of City Creek were washed into the flood waters for a distance more than five miles upstream of Memory Grove. (R. 581, Holzworth deposition, pp. 44-45; R. 584, Haines deposition, p. 41.)

11. More earth material was brought down by the flood waters in City Creek than was later found in the conduit under North Temple, plus the material picked up off of State Street as it was deposited there during the time the water of City Creek was diverted down State Street. (R. 581, Holzworth deposition, p. 45.)

12. The levels of silt and debris carried by City Creek were

so high that, after the waters of the Creek were diverted to State Street and deposited into storm drains underlying Fourth South, Eighth South, and Ninth South, the Fourth South drain became plugged, and the Eighth and Ninth South drains were under threat of also becoming plugged. (R. 584, Haines deposition, pp. 36-37.)

13. Stream flow in City Creek during the spring runoff floods of 1983 exceeded by two times the previous historic high for runoff. (R. 581, Holzworth deposition, p. 39.)

14. The City Creek flood was one which was in excess of that which could statistically be expected to occur within City Creek once in a hundred years. (R. 581, Holzworth deposition, pp. 39-40.)

15. Given the combination of record snow pack; a long, cold and wet spring; and sudden temperature shift from cold to extremely hot, the City Creek flood was one which was characterized by the Flood Control Director for Salt Lake County as unpredictable, unusual and unanticipated. (R. 581, Holzworth deposition, pp. 37-38.)

16. Because of the record snowpack, a heavier than normal spring runoff was expected. However, the conditions which combined to make the flood one which was unpredictable, unusual and unanticipated did not all occur until mid-May, 1983. (R. 581, Holzworth deposition, pp. 5-6.)

17. With respect to paragraph 11 of City's statement of facts, officials of Salt Lake City assumed total responsibility and control of the management of the City Creek flood waters. Salt

Lake County was in nominal control only because of its Ordinance (Sec. 7-2-1 et seq.), enacted under the authority of Sec. 17-8-5, Utah Code, 1953 as amended, which included City Creek as one of the County's natural channels over which County would exercise flood control authority. All decisions and actions relating to efforts to control flood waters in May and June, 1983 from Memory Grove through the conduit to the Jordan River were made by City officials. (R. 581, Holzworth deposition, pp. 18-19, 31-33, 41-42, 49; R. 584, Haines deposition, pp. 4-7.)

18. Repairs to the conduit and North Temple, following the excavation thereof to remove the material plugging the conduit, could not be undertaken sooner than September, 1983, because of continued high water flows through the conduit which prevented engineering design. (R. 304-308, Langer affidavit, para. 6/Atch.)

19. Temporary steel decking or concrete planks were not placed over the cut in North Temple where the road and conduit had been excavated for reasons of cost, safety, efficiency, and engineering necessity. (R. 304-308, Langer affidavit, para. 6/Atch.)

SUMMARY OF ARGUMENT

This case is before the Court for consideration of issues related to the following: (1) Were Defts negligent in the "operation and maintenance" of the conduit underlying North Temple and during the management of the flood waters in City Creek during the 1983 spring runoff flood? (2) If, so, were Defts immune from

suit for such negligence under the provisions of the Utah Governmental Immunity Act?

Establishment of negligence requires more than the allegation, even when the issue is before the courts on a motion for summary judgment. A plaintiff may not avoid the requirements of proof, even at that early stage of litigation, simply by claiming an issue of fact has been raised by the allegation. In this case, RockyMtn has utterly failed to do any more than cry, long and loud, that its allegations raise issues of fact which must be tried, even in the face of unrebutted, admissible evidence presented by Defts through depositions and supporting affidavits which clearly refutes RockyMtn's allegations.

RockyMtn has alleged negligence by Defts in the operation and maintenance of the City Creek conduit. The only specific instance of such negligence subsequently addressed by RockyMtn is the alleged failure of Defts to inspect and clean the conduit in preparation for the runoff. As will be shown hereafter, such allegation is totally without proof.

Even if there were a scintilla of evidence to support RockyMtn's allegation in this specific instance, Defts are immune from suit for claims arising therefrom under the provisions of the Utah Governmental Immunity Act, specifically, Sec. 63-30-10(4) (Section 63-30-10(1)(d) as the Act was written in 1983), which immunizes governmental entities from suit for claims arising out of "a failure to make an inspection or by making an inadequate or negligent inspection."

Further, actions and decisions taken by Defts during the "inspection and maintenance" of the City Creek conduit were the exercise or performance of a discretionary function and any negligence occurring therein are immune under the provisions of the Utah Governmental Immunity Act, Sec. 63-30-10(1) (Sec. 63-30-10(1)(a) as the Act was written in 1983.)

The only specific allegation of negligence occurring during Defts' management of the flood waters is that Defts made improper attempts to clear the City Creek conduit after it became plugged. There is absolutely no evidence presented by RockyMtn to raise an issue of negligence in this instance. Further, the decisions and actions taken by Defts to clear the conduit in the midst of the attempt to control the flood waters of City Creek while those waters were at peak flow were the exercise or performance of a discretionary function and are thus immune from suit.

RockyMtn makes a vague and non-specific allegation of negligence in Defts' decisions/actions relative to traffic control and repair of the conduit and North Temple after the road and conduit were broken open to remove the material which plugged the conduit. As will be shown hereafter, those actions were based upon sound reasons of policy and engineering necessity, which cannot, and have not, been rebutted. Even if there were evidence to support RockyMtn's allegation in this regard, the decisions and actions of Defts in the repair of the conduit and North Temple involve the exercise or performance of a discretionary function and are therefore, under the provisions of Sec. 63-30-10(1), Utah Code,

1953 as amended, immune from suit for claims arising therefrom.

OBJECTIONS TO APPELLANTS' STATEMENT OF FACTS

RockyMtn persists in claiming that certain "facts" have been established which have no basis in the record. These "facts" have been the subject of repeated objections by Defts, yet they continue to appear in every argument made by RockyMtn in this case.

The most egregious of these "facts" are those claimed to have been established by old reports of the United States Army Corps of Engineers. These "reports" are even referenced in this Court's previous decision in this matter (Rocky Mountain Thrift Stores, Inc., et al. v. Salt Lake City Corporation, et al., supra). At p. 460 of said case, the Court states:

> Plaintiffs allege that defendants were well aware of the runoff hazards from City Creek but failed to take adequate precautions to prevent the damage caused by the 1983 spring runoff. . . Plaintiffs rely on several affidavits and a series of reports from the U.S. Army Corps of Engineers to substantiate their claims.

The record of this case clearly establishes that these so-called reports of the U.S. Army Corps of Engineers have never been properly submitted as required by Rule 56, Utah Rules of Civil Procedure. Rule 56 (c) identifies the sources which may be looked to in deciding the propriety of summary judgment. Those sources are "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Goetz v. American Reliable Insurance Co., 844 P.2d 366 (Utah App. 1992), at 372. The Corps of Engineers material to which RockyMtn has continually referred, and the "facts" which RockyMtn maintains are

established by said materials, simply have no lawful foundation. In requests for admissions, found at R. pp. 214-237, RockyMtn requested the defendants to admit to certain statements contained in certain Corps of Engineers documents. RockyMtn quoted extensive sections of said documents and then requested the defendants to admit to the averments of the same. At each request, defendants denied the truth of each and every statement. The only admission made was that the statements appeared to be an accurate copy of the statements made in the Corps of Engineers documents. See Answers to Requests for Admissions, R., 418-443. The documents themselves were never authenticated. Thereafter, copies of the documents were attached by RockyMtn as exhibits to their "Memorandum in Opposition to Defendants Salt Lake County and The State of Utah's Motions for Summary Judgment," filed November 27, 1984. RockyMtn also simply asserted the contents of said reports in their memorandum in opposition to Salt Lake City's motion for summary judgment. (See R. 294-302.) RockyMtn based their argument in said memoranda upon those exhibits, just as if they were proper evidence; and have been doing so ever since. The averments of those documents border on the bizarre, and are thoroughly discredited by persons such as Terry Holzworth, the County's director of flood control during the 1983 spring runoff floods. (See Holzworth deposition, R. 581, pp. 21-22, 50-52.)

In its 1989 decision in this case, the Court recognized that the defendants are prepared to rebut these documents, but observed that the trial court did not reach the negligence issues. At this

point, however, this appeal is based directly upon RockyMtn's allegations of negligence and its utter lack of evidence in support thereof. Consequently, it is time for the Court to finally recognize that these documents, which RockyMtn has used to support "facts" in its latest brief, are not proper evidence as required by Rule 56(c), Utah Rules of Civil Procedure.

Each and every "fact" asserted by RockyMtn based upon those documents must be disregarded. For the Court's information, those "facts" as set forth in RockyMtn's brief, are as follows:

On p. 4 of their brief, RockyMtn states, "In May of 1983, history repeated itself." As authority for said statement, RockyMtn cites a May 16, 1991 affidavit of Clark Lin. (RockyMtn cites this affidavit to be at page 1468 of the record. After an extensive search, counsel for Salt Lake County found that affidavit at page 1481.)* Reference to that affidavit shows the following statement:

> 10. City Creek Canyon has an extensive flooding history and incidents were recorded ever since the days of early settlement. In October of 1969, and again in December of 1978, the Department of the Army, Sacramento District, Corps of Engineers evaluated the flood characteristics of City Creek Canyon and determined that it is subject not only to flooding, but debris flow (such as rock and mud flows). These reports were prepared for the Utah Division of Water Resources and Salt Lake City and County, and advised them that the debris flow would clog the North Temple Storm Drain System leading to City Creek, and cause extensive damage to downtown Salt Lake

---

*Note. This is the point in the record at which said affidavit was submitted to the court by RockyMtn's counsel. The last page of the affidavit, plus purported signature of Clark Lin, is an obvious facsimile; although RockyMtn's counsel, Mr. Theodore, has executed, with an original ink signature, his representation that the affidavit was "subscribed and sworn to" before him.

> City if allowed to enter the storm drain system. Mitigation measures were then recommended in the Corps of Engineers report.

The affidavit thus repeats the unauthenticated hearsay of the reports already discussed.

Rule 56(e), Utah Rules of Civil Procedure, states, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

"Rule 56(e) also requires that an affidavit in opposition to a motion for summary judgment set forth facts that would be admissible in evidence." [A.P. Winter v. Northwest Pipeline Corp., 820 P.2d 916, 919 (Utah 1991).]

The affidavit of Mr. Lin wholly fails to meet these requirements. RockyMtn cannot bootstrap its Corps of Engineers' "reports" into the record through this affidavit.

On page 5 of its brief, RockyMtn repeats the "fact" that "as early as 1979, the government possessed information, produced by the Army Corps of Engineers, that the City Creek Canyon area was vulnerable to massive sudden erosion and debris flow." This time, RockyMtn cites to the reporter's transcript of the parties' oral argument upon Defts' motions for summary judgment. Reference to a transcript of oral argument to establish "fact" is ludicrous. RockyMtn also cites to another affidavit of Mr. Lin, dated December 10, 1990. (Again, the cite is to p. 1338 of the record. After another search, counsel found that affidavit at p. 1400.) That

affidavit contains a paragraph with the exact language as was written in the May 16, 1991 affidavit (quoted above). Again, that affidavit wholly fails to meet the requirements of Rule 56 (e).

On page 6 of its brief, RockyMtn resorts once again to the "fact" that City Creek Canyon has an extensive history of flooding. Again, the May 16, 1991 affidavit of Mr. Lin is cited as the source of that "fact."

On pages 6-7 of its brief, RockyMtn makes the following as a "statement of fact": "Despite the extensive history of flooding in this area, and despite foreknowledge of the high snowpack, and despite the fact that governmental authorities anticipated a higher-than-average spring runoff, the government failed to maintain the drainage system." Again, RockyMtn relies upon the May 16, 1991 affidavit of Mr. Lin as the source of these "facts."

RockyMtn's use of inadmissible documents as a basis for issues of fact is not the only problem with their "Statement of Facts". RockyMtn also cites to the deposition of County Flood Control Director, Terry Holzworth, page 6, to support a "fact" that Defts failed to maintain the City Creek drainage system. On that page, the following question was asked and answered:

> Q. (By Mr. Theodore) "Then basically did you do anything with respect to the pipeline itself along the North Temple viaduct. Was it cleaned out?"
>
> A. (By Mr. Holzworth) "We did not go to any efforts to specifically clean that conduit. We had opportunity to be in that, I can't give you a specific date, sometime between the fall of 1982 and the spring runoff, to repair one of the manholes out there out near the Fairgrounds, and we didn't have a report from our field people that there was any obstruction or accumulation in that storm drain, so we didn't have any

reason to believe that it wouldn't flow freely."

Mr. Holzworth certainly made no statement to justify RockyMtn's assertion that, as a matter of "fact", defendants failed to maintain the drainage system.

In making its "statement of fact" to say that the government failed to maintain the drainage system, RockyMtn conveniently ignores the following questions and answers of Mr. Holzworth, found at p. 14 of his deposition (R. 581):

> Q. (By Mr. Theodore) "Could you briefly describe your inspection system to determine when and how often a conduit should be cleaned?"
>
> A. (By Mr. Holzworth) ". . . As far as this particular storm drain and any other conduit system Salt Lake County has responsibility for, the routine program so far has not evolved to the point where we have the ability to go in and clean those on a scheduled basis, so by and large the backing up of water or obstruction to the flow of the system are triggers toward the need for extensive work or cleaning work.
>
> "We've had flows in the vicinity of 160 cubic feet per second in the spring of 1982, also some summer storms in the summer and fall of 1982 and didn't have any problem demonstrating--no demonstrated problem with capacity in the City Creek or any other pipe system, so we were relying on that experience to tell us that obstructions were not there."

On p. 44, the following questions and answers were given:

> Q. (By Mr. Cutler) "At no time was there ever any indication there was ever any impediment to the stream flow coming down through the North Temple conduit; is that right?"
>
> A. (By Mr. Holzworth) "That's correct, we had no indication of any obstruction."
>
> Q. "So you had formed an opinion then in your overall assignment of County resources that the North Temple drain was serviceable?"
>
> A. "That's correct."

Thus in arriving at their "statement of fact" that the government failed to maintain the drainage system, RockyMtn lifted information from Mr. Holzworth's deposition out of context, mischaracterized to this Court what Mr. Holzworth said, and ignored further testimony which established that Salt Lake County's maintenance system for the North Temple conduit was to respond to apparent blockages or impediments and remove them. Because runoff from summer and fall thunderstorms (including the tremendous thunderstorm of September, 1982) had passed through the conduit without problems, Mr. Holzworth made a determination that the conduit was clean. This is the exact opposite of RockyMtn's "fact" that the government failed to maintain the conduit.

By citing to Clark Lin's affidavit to support their "statement of fact" quoted above, RockyMtn again asks the Court to ignore the requirements of Rule 56(e). Nowhere does the affidavit establish that Mr. Lin bases his statements upon personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that Mr. Lin is competent to testify as to the City's, County's, or State's program for inspection and maintenance of the North Temple conduit.

RockyMtn continues in its "statement of facts" to make further representations to the Court which have no support as required by Rules 56 (c) and (e). On page 7 of its brief, RockyMtn again asserts that "for several years prior to the flood, the government failed to clean the system." That assertion's cite to Mr. Holzworth's deposition, page 6, is totally erroneous, and the

assertion has no support in the record.

RockyMtn asserts that the failure to maintain "allowed sediment to build-up in the North Temple culvert." This assertion cites to the record, pp. 1303-1308. Those pages, however, contain portions of two separate documents -- "Plaintiffs Answers to Salt Lake City's First Set of Interrogatories," (Exhibit 'U' to Salt Lake City's Memorandum in Support of its Motion for Summary Judgment, filed May 9, 1991) and "Supplemental Answers to Salt Lake City's Interrogatories to Plaintiffs," (Exhibit 'V' to said Memorandum). Thus, whatever RockyMtn meant by its reference to those pages of the record is unknown. The assertion also cites Mr. Lin's deposition as the basis for the "fact." A review of that deposition, particularly that part cited, shows that Mr. Lin testifies as to matters which would not be admissible in court. Nowhere does he claim any personal knowledge, nor competence to give evidence concerning sediment build-up in the North Temple conduit. To make an assertion of "fact", Mr. Lin must have personal knowledge in order to testify as to a build-up of sediment. The assertion is not an expert opinion, which Mr. Lin, <u>if</u> he could qualify as an expert, could give based upon hearsay. Mr. Lin cannot, therefore, be used by RockyMtn to establish a "fact."

The next assertion made by RockyMtn as "fact" states, "the sediment was a major factor in blocking flood water and in the subsequent flooding." Its cite to the record is to pp. 1050-1051, which is a portion of Mr. Lin's deposition, attached to Salt Lake

City's aforementioned memorandum in support of its motion for summary judgment as Exhibit 'C.' Those pages contain no mention of a sediment build-up whatsoever. Again, whatever RockyMtn meant by reference to those pages is unknown. And, again, RockyMtn cites Mr. Lin's May 16, 1991, affidavit as support for this "fact."

Although this discussion has been long and detailed, it is made to show what has been wrong with this case from the beginning. RockyMtn has continually made bald allegations and, when challenged for proof, refers the challenger to more allegations, or to hearsay. This detailed analysis of RockyMtn's "Statement of Facts" is presented to show the Court that RockyMtn has not complied with Rule 56, Utah Rules of Civil Procedure, nor with Rule 24 (a)(7) and (e), Utah Rules of Appellate Procedure.

ARGUMENT

POINT I

SALT LAKE COUNTY (AND CITY) WAS NOT NEGLIGENT REGARDING INSPECTION/MAINTENANCE OF THE NORTH TEMPLE CONDUIT

RockyMtn alleges that Defts were negligent in the inspection/ maintenance of the North Temple conduit. Beyond that allegation there is nothing. The record is absolutely devoid of any evidence to support the allegation. The best RockyMtn can do is point to the deposition and affidavits of Clark Lin. Examination of those materials shows that Mr. Lin is asserting a lack of maintenance/ inspection upon two bases: (1) That the materials found in the conduit during the clean-out process were "dry", "cementitious",

and "hard-packed clay"; and (2) the fact that the conduit plugged in the first place.

As to (1), Mr. Lin's deposition makes clear that he has no personal knowledge of the condition of the materials found in the conduit when it was cleaned out. He was not there. He did not review a soils report. There was no analysis of the materials. He bases his description, and opinion, upon the deposition of Frank Helm.

Mr. Helm testified in his deposition as follows regarding the material found in the conduit:

> "Q. (By Mr. Theodore) The type of debris, the largest size you indicated was around a two-foot diameter boulder?
>
> "A. (By Mr. Helm) We took boulders, cobbles, the creek run cobbles out approximately two-foot in diameter and down. It was varying. It was almost a cementitious material. It was very dense and hard packed in this area.
>
> "Q. Could you tell how long that material had been in the pipe to become in a cementitious compaction?
>
> "A. No, I couldn't because I'm not a geologist. I wouldn't -- it could have been in two weeks or it could have been in two years or it could have come down with the flood from City Creek.
>
> "Q. So you couldn't make an opinion one way or the other?
>
> "A. No, sir, I wouldn't.
>
> "Q. Okay. The nature of the compaction, was it a cement-like consistency at the time that you were going through or is it--
>
> "A. No, When I say cementitious, it was very densely packed.
>
> "Q. But it wasn't anything that would be considered a cement type of aggregate that had plugged the entire

pipe? You are talking about densely compacted material?

"A. Right.

"Q. And could you tell whether there was a gradient on the material, whether the large objects had settled to the bottom or were they all add mixed in a uniform type of mixture or do you recall?

"A. I would say that where we started boring, it was pretty uniformly mixed because there was fines in it." (R. 583, Helm deposition, pp. 24-25.)

Mr. Helm does not describe the material found in the conduit any further. In particular, he makes no statement concerning the relative wetness or dryness of the material. Nor does he make any reference to the material as "clay."

We now turn to the testimony of Mr. Lin, the witness upon whom RockyMtn relies to make its claim of negligence. His deposition states as follows:

"Q. (By Mr. Baird) You told me that the pipes were plugged before the flood, correct?

"A. (By Mr. Lin) Correct.

"Q. What do you base that on, sir?

"A. Well, from the depositions, you know, I read that shows what the -- I mean the pipes -- you know, the mud -- not the mud -- the materials in the pipe are dry clays.

"Q. Whose deposition did you read that in, sir?

"A. I don't recall the name. I have to go through them.

"Q. Take your time. Point me to every page, sir, in those depositions where anyone tells you that the pipes were plugged up with hard clay.

"A. Could I talk to my lawyer?

"Mr. Baird: Yes, I'll let you.

(Discussion held off the record between the witness and Mr. Theodore.)

"The Witness: I remember where they had to auger the pipes.

"Q. (By Mr. Baird) Does augering the pipes, sir, necessarily mean that the material in it was hard-packed clay?

"A. Yes. I mean, it's hard.

"Q. You never auger anything other than hard-packed clay; is that correct?

"A. Not necessarily.

(Time lapse.)

"Q. While you're looking, let me look through this other one.

"A. Go ahead. I think this is the only one I'll be looking at.

(Time lapse.)

The Witness: Okay.

"Q. You found it?

"A. Yes.

"Q. Tell me what page and line it is, sir.

"A. It's in the conversation on pages 24, 25, 26 through about 27.

"Q. That's the deposition of who?

"A. Frank Helm.

"Q. . . . Is there any other source, sir, for you to understand that this material was dry or hardened clay?

"A. No."

. . .

"Q (By Mr. Baird) I'm reading from a portion of Mr. Helm's testimony. Tell me if this is what you're relying on.

'Question: Could you tell how long that material had been in the pipe to become in a cementitious compaction?

'Answer: No, I couldn't because I'm not a geologist. I wouldn't -- It could have been in two weeks, or it could have been in two years, or it could have come down with the flood from City Creek.

'Question: So you couldn't make an opinion one way or another?

'Answer: No sir, I wouldn't.'

Correct? You just read that; correct?

"A. Right.

. . .

"Q. If Mr. Helm who was there says that he can't tell whether it came down two weeks before, two years before or with the flood, how can you, sir, sitting here tell me that you know that that material didn't come down either two weeks before or with the flood?

"A. Okay. I -- I read both. All right. And I form my own opinion." (R. 1047, Lin deposition, pp. 13-16.)*

It is conceded that one testifying as an expert does not necessarily have to have first-hand knowledge of the material upon which the expert opinion is based. (Rule 705, Utah Rules of Evidence.) However, just because one is called as an expert witness does not mean that everything to which he testifies is an expert opinion. An expert witness may not relate hearsay when it is not part of an expert opinion. In this case, Mr. Lin is

---

*Note: Although the deposition is contained in the record at this point as an exhibit to Salt Lake City's memorandum in support of its motion for summary judgment, the deposition was published on motion of counsel for Salt Lake County. See the transcript of the hearing upon said motion, R. Vol. V, p. 31.)

describing the materials found in the conduit. That does not require an expert opinion. What it does require is personal knowledge of the materials. That is something Mr. Lin does not have, and his description of the materials as dry, cementitious, hard-packed, clay is inadmissible hearsay. Worse than that, it doesn't even accurately repeat the description given by Mr. Helm, who did have first-hand knowledge of the material in the conduit.

Since Mr. Lin's "expert opinion" that the conduit was plugged before the runoff started is based upon a non-existent set of "facts", it is no opinion at all, and cannot be used by RockyMtn to prove its allegation of negligence in the inspection/maintenance of the conduit. Without that "expert opinion", RockyMtn has no evidence whatsoever that lack of inspection/maintenance caused the conduit to plug. Thus summary judgment on that issue was properly granted.

As to (2), above, Mr. Lin has claimed that the mere fact the conduit became plugged proves that there was no inspection/ maintenance of the drainage system. This is nothing more than a resort to res ipsa loquitur in a situation where it is not permitted.

The doctrine of res ipsa loquitur requires a plaintiff to prove three elements: (1) The accident was of a kind which, in the ordinary course of events, would not have happened in the absence of negligence; (2) the agency or instrumentality causing the accident was at the time of the accident under the exclusive management or control of the defendant; and (3) the plaintiff's own

use or operation of the agency or instrumentality was not primarily responsible for the accident. [King v. Searle Pharmaceuticals, Inc., 832 P.2d 858 (Utah 1992).]

> Ultimately. . . to establish a res ipsa loquitur case, the plaintiff must lay a foundation from which it can be established that negligence was probably the cause of the injury. The law is clear that an undesired complication or result. . . does not by itself imply that the result was caused by someone's breach of a duty of due care. [Id., at 862.]

In the instant case the factors which combined in May, 1983 to produce the historic floods occurring throughout the State of Utah were obviously not within the management or control of the defendants. The tremendous amount of earth materials brought down during the flood, which ultimately caused the blockage, were a direct result of the combination of factors of record snowpack; late, wet and cold spring; sudden temperature shift from cold to very hot. None of those factors was within the defendants' control. Control of the debris within the flood was also not within the exclusive control of the defendants. To even attempt such control, defendants would have had to design and construct a debris-collection and drainage system far more extensive than was feasible, given the extremely rare occurrence of such floods vis-a-vis the high cost to the citizens of Salt Lake County to install such a system. Since this Court has previously ruled in Rocky Mountain Thrift Stores, supra, that defendants cannot be sued for the exercise of its discretionary powers concerning the extent of the drainage system it must install to protect citizens of Salt Lake County, it cannot now be argued that the defendants have

exclusive control over the debris-laden flood waters which are the source of RockyMtn's complaint. Further, defendants would never know when it has installed a sufficient drainage system to stop all flooding. That fact alone establishes the no one can have exclusive management and control over the causes of flood.

Therefore, since res ipsa loquitur is not applicable in this case, Mr. Lin's assertion that negligence in inspection/ maintenance of the conduit is established by the mere fact that the conduit became plugged cannot be used by RockyMtn to avoid summary judgment.

POINT II

ALL DEFENDANTS ARE IMMUNE FROM SUIT FROM CLAIMS ARISING OUT OF A FAILURE TO MAKE AN INSPECTION OR BY MAKING A NEGLIGENT OR INADEQUATE INSPECTION

The point raised herein was relied upon by the trial court as a basis for grant of summary judgment to defendants. That court's analysis is adopted for purposes of this argument. The court stated,

> Lin used the terms "maintenance" and "inspection" interchangeably, but it is clear that a regular "program" of inspection would be either the precursor to or a part of maintenance. As such, it is subject to either the applicable statutory provision immunizing government conduct relating to inspections or failures to inspect or is the result of a policy decision not to have a regular program for inspection and maintenance and thus entitled to discretionary immunity. (R. 1579, Summary Decision and Order.)

In Ledfors v. Emery County School District, 849 P.2d 1162 (Utah 1993), this Court construed the meaning of the Utah Governmental Immunity Act's language which retains immunity for

governmental entities from claims "arising" out of certain situations. In that case, which involved claims for damages to a child injured by a beating received at the hands of other students, plaintiffs brought suit against the school district alleging a failure to supervise. The school district defended upon the basis that Sec. 63-30-10 (2), Utah Code, 1953 as amended, retained immunity for claims arising out of assaults. This Court stated,

> (W)e likewise find no merit in the Ledforses' argument that the injuries alleged here arose from the failure to supervise rather than from a battery. Again, our prior cases have looked to whether the injury asserted "arose out of" conduct or a situation specifically described in one of the subparts of 63-30-10; if it did, then immunity is preserved. We have rejected claims that have reflected attempts to evade these statutory categories by recharacterizing the supposed cause of the injury. [Id., at 1166.]

In the instant case, RockyMtn attempts to categorize its claim as a "failure to maintain" the conduit (although RockyMtn also often characterizes the alleged fault of defendants as a "failure to inspect"). However, as stated by Judge Murphy, "(I)t is clear that a regular 'program' of inspection would be either the precursor to or a part of maintenance." (Summary Decision and Order, supra.) Thus, whether characterized as "maintenance" or "inspection", defendants actions in regard to monitoring the North Temple conduit are immune under the provisions of Sec. 63-30-10(4).

POINT III

DEFENDANTS ARE IMMUNE FROM SUIT FOR CLAIMS ARISING OUT OF THE EXERCISE OR PERFORMANCE OF A DISCRETIONARY FUNCTION

A program of inspection and maintenance for storm drainage conduits necessarily involves the exercise of a discretionary

function. This Court has stated four factors to consider in determining whether actions of a governmental entity qualify as "discretionary functions." [Little v. Utah State Div. of Fam. Serv., 667 P.2d 49 (Utah 1983), reiterated in Rocky Mountain Thrift Stores, supra.] Those factors are discussed as follows:

1. "Does the challenged act, omission or decision necessarily involve a basic governmental policy, program or objective?"

Salt Lake County's program for the carrying away and safe disposal of natural storm and flood waters is based upon specific authorization of the legislature, found in Sec. 17-8-5, Utah Code. This Court has already found that activities relating to flood control management in City Creek Canyon are governmental functions. [Rocky Mountain Thrift Stores, supra, at 462.] There is no qualitative difference between utilization of the North Temple conduit for carrying away storm and flood waters of City Creek and the utilization of conduits for carrying away storm and flood waters in any other natural watercourse, such as Emigration Creek, Mill Creek, etc., or, for the carrying away storm and flood waters from subdivision streets. It is therefore contended that the installation and maintenance of a storm drainage system involves a basic government policy, program or objective. The criteria of this first of four factors are clearly met in this case.

2. "Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which would not change the course or

direction of the policy, program, or objective?"

The questioned act here is whether to inspect/maintain the conduits which carry storm and flood waters. Once a drainage system, which includes conduits, is constructed, the level of maintenance to be provided thereafter is an essential consideration in the overall effectiveness of the system. Depending upon the decisions made by the governmental entity's governing body as to the inspection/maintenance to be provided, a storm drainage system can remain at design capacity, or diminish to the point as if the system had not been constructed in the first place. It is therefore submitted that installation and maintenance of a storm drainage system meets the second of these four factors.

3. "Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?"

The level of inspection/maintenance to be provided all or part of a storm drainage system calls into issue all of the policy evaluation, judgment, and expertise that is required to decide whether to install the system in the first place, as well as the design characteristics to be included during the installation. Each time inspection and maintenance of a drainage system is considered, policy makers must weigh the competing needs of other government programs for funds. An appropriation in one program will necessarily lessen the funds available for another program. The tax burden to be levied upon the citizens is involved in every budget process. Flood control officials must make reasoned

decisions whether a particular channel must be cleaned to meet anticipated needs. Differing weather patterns affect those decisions. An official may reason, for example, that because there was very little snowpack during a winter season that runoff will be so slight as to not require rigorous cleaning of water channels to prepare for it; consequently, his available funds would be better utilized that year for construction of an expanded drainage system. On the other hand, the need for clearing water channels may appear so great in order to prepare for an immense snow pack runoff that the flood control official will have to decide which area is most at risk for flooding and devote his resources accordingly. A good example of the expertise and judgment required in this area is provided in this case. Terry Holzworth, Salt Lake County flood control director, testified that he had determined that conduits in the County would be cleaned when obstructions appeared, rather than conduct regularly scheduled inspection/maintenance which may or may not be needed. He made the decision with the knowledge that his resources would be stretched very thin while his department worked to prepare the watercourses in the County for the 1983 spring runoff. He used his expertise and judgment to decide that the North Temple conduit was clean and unobstructed because it had successfully carried the extremely high urban runoff from the previous September's cloudburst without serious problems. Instead, he concentrated the efforts and funds of the flood control division to cleaning and preparing the open channel portion of City Creek, upstream of Memory Grove, as well as to the channels of other

watercourses throughout the County. It is therefore submitted, that inspection/maintenance of drainage systems meets this third of four factors.

4. "Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?"

The previous discussion establishes that this factor is clearly met. Also, Section 17-8-5, Utah Code, 1953 as amended, clearly places authority in Salt Lake County to plan for and construct drainage systems for storm and flood runoff.

Therefore, Judge Murphy correctly ruled that a determination whether to conduct a regular program of inspection and maintenance, or not, is the result of a policy decision and is thus entitled to discretionary immunity.

POINT IV

DEFENDANTS WERE NOT NEGLIGENT IN THE REPAIR AND RESTORATION OF NORTH TEMPLE AND IN THE MAINTENANCE OF AN OPEN EXCAVATION UNTIL REPAIRS WERE COMPLETED

In a vague and off-handed way, RockyMtn claims they were damaged because Defts were negligent in the manner in which they conducted the repair and restoration of North Temple after the street and conduit were opened to clean out the materials which blocked the conduit. RockyMtn's allegation in this regard is set forth in the First Cause of Action of their Complaint. As explained above, that cause of action was not pursued by RockyMtn and soon became moot. However, in the Second Cause of Action,

RockyMtn may be deemed to have repeated their allegation in para. 26 of the complaint, which states, "Plaintiffs replead and reallege the allegations contained in paragraphs 1 through 25 of the First Cause of Action."

Beyond that allegation, RockyMtn has presented absolutely no evidence through depositions, interrogatories, admissions, or affidavits to provide any proof of the allegation. However, in response to the allegation, Salt Lake County submitted an affidavit in support of its motion for summary judgment. That affidavit was prepared by Wilfried Langer, vice-president of J.M. Montgomery Consulting Engineers, Inc. It is a direct refutation of RockyMtn's allegation of negligence in the defendants' maintenance of an open excavation after the conduit and street were opened to clean the conduit, the refusal to place steel decking or concrete planks over the excavation, and in the start of repairs. The affidavit is at pp. 304-308 of the record on appeal. The facts stated in said affidavit are absolutely undisputed by RockyMtn in any way, shape, or form.

Rule 56(e), Utah Rules of Civil Procedure, states as follows:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

It is well established that upon submission of Mr. Langer's affidavit, RockyMtn is required to submit responsive affidavits or other evidentiary materials allowed by Rule 56(e). Upon its

failure to do so, the trial court could properly conclude that there are no genuine issues of fact and, on the basis of applicable law, enter summary judgment in favor of the defendants. [Cowen and Company v. Atlas Stock Transfer Co., 695 P.2d 109 (Utah 1984).] Consequently, defendants are entitled to summary judgment in regard to this allegation of negligence made by RockyMtn.

POINT V

SALT LAKE COUNTY OWED NO DUTY TO PLAINTIFFS TO CONTROL THE 1983 SPRING RUNOFF FLOOD, NOR TO INSTALL, INSPECT, OR MAINTAIN A DRAINAGE SYSTEM FOR CITY CREEK

Salt Lake County has no statutory duty to provide for any flood control of City Creek, nor of any other channel within the County.

Salt Lake County's role in the control of flood and storm waters for the benefit of the citizens residing in the County is based upon the authority provided by Sec. 17-8-5, Utah Code, 1953 as amended. That statute states:

> In anticipation of and to provide for the carrying away and the safe disposal of natural storm and flood waters, the board of county commissioners may remove any obstacle from any natural channel within the county and the incorporated municipalities in the county. For the same purpose, the board may plan for and construct new channels, storm sewers and drains to serve as though they were natural channels . . . The board of commissioners may also provide for the maintenance, improvement and fencing of all such channels, including covering or replacement with buried conduits. . . .

By this statute, the legislature authorized counties to engage in flood and storm water control through use and regulation of natural channels, as well as to establish new channels to serve as

though they were natural channels. The amount, quality, level, and type of flood control effort is left to the discretion of the board of commissioners. The statute imposes no mandate or duty for any flood control, but only an authority to act which the board "may" exercise. In Board of Education of Granite School District v. Salt Lake County, 659 P.2d 1030 (Utah 1983), at 1035, this Court stated, "This Court assumes that the terms of a statute are used advisedly and should be given an interpretation and application which is in accord with their usually accepted meanings." A provision of a statute couched in permissive terms is generally regarded as discretionary unless the context clearly indicates otherwise. In Grant v. Utah State Land Board, 485 P.2d 1035 (Utah 1971), this Court found the word "may," in a statute pertaining to the land board, not to import certainty, but uncertainty; and thus, the reasonable deduction to be made was that the ordinary meaning of the term "may" was that one "may" or "may not" act. "If the legislature had intended an absolute right . . . instead of saying that an applicant 'may have his contract reinstated,' it could easily have used the word 'shall' or 'must,' and thus have rendered a mandatory meaning clear." (Id., at 1036-1037.)

Similarly, the term "may" in Sec. 17-8-5 vests the board of county commissioners with discretion as to the amount or extent of flood and storm water management it will provide. The County had no "duty" to provide RockyMtn any particular kind, type, or degree of protection from natural storm and runoff waters.

Salt Lake County's authority in this area is similar to the

authority granted Salt Lake City under the provisions of Sec. 10-8-38, Utah Code, 1953 as amended, wherein it states:

> Boards of commissioners, city councils and boards of trustees of cities and towns may construct, reconstruct, maintain and operate, sewer systems, sewage treatment plants, culverts, drains, sewers, catch basins, manholes, cesspools and all systems, equipment and facilities necessary to the proper drainage . . . requirements of the city or town and regulate the construction and use thereof.

POINT VI

SALT LAKE COUNTY HAD NO ROLE IN MANAGEMENT OF FLOOD WATERS OF CITY CREEK DURING THE ATTEMPTS TO CONTROL SAID WATERS AND NO RESPONSIBILITY FOR CITY'S ACTIONS

It is an undisputed fact that officials of Salt Lake City made all decisions, and took all actions, involved with the management of the flood waters of City Creek during the period in which the North Temple conduit became plugged, and in the attempts to remove that obstruction. Salt Lake City stands on a equal footing with Salt Lake County as regards municipal authority within the State of Utah, and has never been considered to be the agent of Salt Lake County in the provision of municipal services or exercise of police power. As this Court made crystal clear in Mountain States Telephone and Telegraph v. Salt Lake County, 702 P.2d 113 (Utah 1985) (utility franchise fees case), and Salt Lake City Corporation v. Salt Lake County, 550 P.2d 1291 (Utah 1976) ("double taxation" case), cities and counties are not alter egos of each other, and are not agents of the other. Each one has its separately ordained powers and responsibilities. Therefore, RockyMtn's allegations of negligence which involve those actions and decisions taken by

officials of Salt Lake City during their attempts to manage the flood waters of City Creek and the removal of the obstruction in the North Temple conduit do not raise allegations of negligence against Salt Lake County.

POINT VII

CLARK LIN CANNOT PROVIDE COMPETENT TESTIMONY

TO ESTABLISH NEGLIGENCE ON PART OF DEFENDANTS

In every instance where Defts present evidence, in the form required by Rule 56(e), RockyMtn attempts to avoid judgment by claiming that Clark Lin, as an expert, has raised a "question of fact" which requires the case to go to trial. However, as alluded to above, Mr. Lin has not saved the case for RockyMtn because he has not, and cannot, provide evidence as required by Rule 56(e).

In Butterfield v. Okubo, 831 P.2d 97 (Utah 1992), this Court held,

> (T)he drafters (of Rule 705, Utah Rules of Evidence) did not intend to exempt expert affidavits in opposition to summary judgment from rule 56(e)'s requirement that affidavits set forth specific facts showing there is a genuine issue for trial. We therefore follow the path laid down in *Williams* [Williams v. Melby, 699 P.2d 723 (Utah 1985)] to the explicit holding that affidavits must include not only the expert's opinion, but also the specific facts that logically support the expert's conclusions. . . In so doing, we stress the requirement that rule 56(e) requires *specific* facts. . . (A) bare assertion that the expert has reviewed the facts and based his or her opinion on them will *not* suffice. (Id., at 104.)

Long sections of Mr. Lin's deposition have already been quoted herein to show that he cannot point to specific facts which support his opinion of negligence. RockyMtn apparently recognized that failing, and made one last attempt, through submission of Mr. Lin's

affidavit dated May 16, 1991, to raise a genuine issue of fact. Most of that affidavit has been discussed above, particularly as it references the non-existent reports of the Army Corps of Engineers. The remainder of that affidavit is now examined.

Mr. Lin states that

> (I)t is practical to handle debris flows or sediment laden flows with a system of debris basins and open channels as practiced in jurisdictions such as Los Angeles and Las Vegas. If an enclosed pipe system must be used, such as the subject of these proceedings, it is standard procedure in the industry to install debris basins to prevent the debris or large amounts of sediment from entering the pipe system and to employ a program of maintenance and inspection to insure that the pipes are kept clean to prevent blockage of the flow passages. (R. 1482, Lin affidavit, para. 11.)

Not only does Mr. Lin's statement fail to relate any specific facts to support his opinion, his opinion at this point addresses an area which has already been ruled by this Court to be immune from suit. The design and capacity of the City Creek drainage system has been ruled to be a discretionary function.

Mr. Lin goes on to say, "These enclosed pipe systems quickly lose their ability to convey water and debris if they are not cleaned as <u>often as necessary</u>, usually at least once a year before the spring runoff" (emphasis added). (R. 1482-1483, Lin affidavit, para. 11.) Mr. Lin recognizes that the basic requirement for cleaning is "as necessary." That is the same standard applied by Flood Control Director, Terry Holzworth, who relied upon impediments or blockages to tell him that a conduit needed cleaning. Moreover, as the Defts' affidavits, answers, and depositions in this case clearly show, there was no blockage in the

conduit prior to the runoff. The conduit was clean, made so by the prior September's massive cloudburst, which was carried through the North Temple conduit without problems. (See Mitckes' affidavit, R. 1149.)

Mr. Lin goes on to say, "In his opinion, it was not good, accepted engineering practice for Salt Lake County in 1983 not to have a program to regularly inspect and clean the North Temple conduits (sic) leading to City Creek at least once each year before the spring runoff." (R. 1483, Lin affidavit, para. 12.) Again, Mr. Lin has no specific facts upon which to base his opinion. The facts are that Salt Lake County did have a program to inspect and clean conduits. It's "trigger" for cleaning, as stated by Mr.Holzworth, is an indication of reduced flow. Mr. Lin has already admitted that the important requirement is to clean as often as is necessary. His once per year standard has no logical support.

Mr. Lin then states,

> Given the extensive five block long clog of the 7 foot diameter North Temple segment of the City Creek drainage system, in his opinion the conduits already contained extensive sediment deposits accumulated from the past before the 1983 Spring run-off, and consequently plugged as predicted by the Department of the Army Sacramento District, Corps of Engineers. (R. 1483, Lin affidavit, para. 13.)

The Corps of Engineers "predictions" have already been discussed. They are inadmissible and cannot support Mr. Lin's opinion. Besides, all Mr. Lin has done here is repeat his "opinion" that the conduit was filled with sediment, even though such a statement is one of fact and requires personal knowledge.

As has been repeatedly stressed, Mr. Lin has no facts upon which to give an opinion that the conduit would have been any more clean and ready for the 1983 runoff than if Salt Lake County had sent an army of workers through the conduit with brooms and dust pans on May 15, 1983.

In his next paragraph, Mr. Lin further opines concerning the negligence arising from certain facts, i.e., diversion of all of the City Creek above ground through a man made channel before the conduit was plugged. (R. 1483, Lin affidavit, para. 14.) That may be all right if only the "facts" stated as the premise of Mr. Lin's opinion were facts. However, The City has thoroughly refuted those "facts" and Mr. Lin has no other basis for the opinion. (It is interesting, however, to note that in this paragraph of his affidavit, Mr. Lin recognizes that the City Creek conduit has a "self-cleaning" capacity. This is exactly what Mr. Holzworth and Salt Lake County relied upon as part of its conduit maintenance program.)

Next, Mr. Lin tries to refute (R. 1483, Lin affidavit, para. 15) Defts' May 9, 1991 affidavit of Stephen Mitckes (R. 1149), which established the flows in the City Creek conduit in September, 1982, and between May 24, 1983 and June 3, 1983. Mitckes' affidavit showed that the conduit carried up to 272 cfs in September, 1982; and carried up to 206 cfs between May 24, 1983 and June 8, 1983, when the conduit plugged. The effect of these measurements is clearly that the conduit could not have been filled with sediment before the 1983 spring runoff because it carried up

to the conduit's capacity for several days before it finally plugged. All Mr. Lin does in his affidavit to refute the meaning and effect of these facts is to say, "Mitckes has not provided sufficient data to establish the reliability of his flow measurements." Where are Mr. Lin's facts, as required by Rule 56(e)?

POINT VIII

PLAINTIFFS FAILED TO COMPLY WITH REQUIREMENTS OF RULE 4-501, CODE OF JUDICIAL ADMINISTRATION

The trial court has identified the failure of RockyMtn to meet the requirements of Rule 4-501(2)(b) in response to Defts' motions for summary judgment. The rule must be enforced in order for it to have any meaning. Parties should not be allowed to ignore the rule, make no attempt to marshal its facts for the trial court, and then obtain relief from the appellate courts. The rule is extremely easy to understand, and puts no unfair burden on the parties to a lawsuit. As this case perfectly exemplifies, nearly complete disorganization will result when the rules aren't followed. Salt Lake County joins with other defendants in urging this Court to set a standard which requires parties to comply with Rule 4-501(2) or else the offending party may not claim to have facts before the courts which will avoid summary judgment. This court will never have a better case than this one with which to set this reasonable rule. Since enforcement of the plain language of Rule 4-501(2) in such a manner in this case creates no new burdens, nor deprives any party of rights which they can claim to have had

prior to establishment of Rule 4-501, this Court should hold RockyMtn has not established any facts in this case.

CONCLUSION

So many unsupported claims and allegations have been made by RockyMtn in this case that it has been difficult to focus this brief. And, as this appeal is from a summary judgment, every allegation must be examined in order to foreclose RockyMtn from claiming that it has raised an issue of fact and is thus entitled to trial.

Nevertheless, Salt Lake County has painstakingly attempted herein to show that RockyMtn has not one single fact before the Court which would entitle it to a trial, whether or not Rule 4-501(2)(b) is enforced against RockyMtn.

Simply stated, RockyMtn has not submitted before the Court, by way of affidavit, deposition, answer, or admission, as required by Rule 56(c) and (e), Utah Rules of Civil Procedure, any facts to support the allegations of its pleadings. Particularly, it has not responded to Defts' refutation of those allegations. All RockyMtn has done is claim that its allegations entitle it to a trial.

RockyMtn alleged negligence in the failure to "inspect and maintain" the conduit. The only failure claimed is a failure to clean before the runoff. Defts have denied, with admissible evidence, that allegation. RockyMtn has not overcome that denial with any evidence whatsoever.

Additionally, Salt Lake County claims the benefit of the

Governmental Immunity Act, Sec. 63-30-10 (1) and (4), upon the defense that the maintenance program of the County is a discretionary function and/or claims arising out a failure to inspect are immune from suit.

Salt Lake County is also entitled to the defense allowed by Sec. 63-30-10 (1) upon the premise that it is has no duty to provide RockyMtn with protection from floods or flooding. The County's program is based upon an authorization from the legislature to plan for, and construct, storm and flood water drainage. The extent of that drainage, which necessarily includes the type and amount of maintenance the County can afford, involves discretionary decisions. Giving RockyMtn the benefit of every allegation in this case only shows a complaint that Defts didn't do more for them. RockyMtn cannot point to a single act or omission of Defts which put it in danger of damage from a dangerous condition created by Defts <u>after</u> the discretionary decisions were made and effectuated.

RockyMtn then claims damage from a negligent failure to immediately repair the conduit and North Temple. Salt Lake County has unequivocally countered that allegation with the affidavit of the engineer retained to complete that work. RockyMtn fails to respond to that affidavit as required by Rule 56(e).

In short, Defts are entitled to summary judgment on the basis of governmental immunity. That is so, even accepting RockyMtn's allegations as fact. But in the main, RockyMtn has not countered the refutations by Defts of each and every instance of negligence

it has alleged. It simply has no evidence to back up its claims.

Salt Lake County therefore requests this Court to sustain Judge Murphy's reasoned order of summary judgment.

RESPECTFULLY submitted this 21st day of June, 1993.

KEVAN F. SMITH
Deputy Salt Lake County Attorney
Attorney for Defendant, Salt Lake County
2001 South State Street, Suite S-3600
Salt Lake City, Utah 84190

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Appellee's Brief upon each of the following by depositing the same, postage prepaid, in the United States mail, addressed as indicated, on the 21 day of June, 1993:

Anne Swensen
Snow, Christensen and Martineau
10 Exchange Place, Suite 1100
P.O. Box 45000
Salt Lake City, Utah 84111

Bruce R. Baird
Assistant Salt Lake City Attorney
451 South State Street, Suite 505
Salt Lake City, Utah 84111

Wesley F. Sine
Attorney at Law
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Karen F. Smith

A P P E N D I X

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROCKY MOUNTAIN THRIFT STORES, INC., dba HOPE OF AMERICA THRIFT STORE, et al.,	:	SUMMARY DECISION AND ORDER
Plaintiffs,	:	CIVIL NO. C-83-6678
vs.	:	
SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah, et al.,	:	
Defendants.	:	

This matter comes before the Court on a series of motions: defendants' motions for summary judgment; plaintiffs' motion to amend the complaint; and defendant Salt Lake City's motion for contempt. Plaintiffs claim that the defendants' negligence in managing the flood waters of 1983 and specifically the North Temple storm drain caused serious disruption to plaintiffs' businesses when North Temple had to be excavated.

Both of the remaining defendants, Salt Lake City ("the City") and Salt Lake County ("the County") have moved for summary judgment on numerous grounds. Plaintiffs' responses to these motions is wholly inadequate. Plaintiffs have failed to

adhere to there requirements of Rule 4-501(2)(b). This failure is significant in a complex case such as this where adherence to the rule is a necessity for the Court to sort through complex theories, allegations and factual setting. If the Court in this Summary Decision has misapprehended or failed to acknowledge any genuine issue of material fact, it is because plaintiffs have not adhered to Rule 4-501 or otherwise submit their theories and evidence in an understandable manner.

On remand from the Supreme Court, this Court should determine whether the alleged negligence related to inspection or to maintenance and operation, whether the alleged negligence was the result of policy decisions or operational decisions, and other defenses raised by defendants. Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459, 464 (1989).

In response to the defendants' claim that there is no genuine issue of material fact concerning their negligence, plaintiffs suggest the following areas of negligence have some evidentiary support: (1) failure to clean the storm drain prior to the flood; (2) the use of a dragline which in turn allegedly precluded the use of augering equipment; (3) the use of a 12 inch auger rather than a 48 inch auger; (4) the use of blasting in the clogged drain; (5) the use of fire hoses; (6)

the covering of the inlet with a metal plate and allowing debris to thereafter settle.

In support of their claim that genuine issues of material fact exist concerning the six areas of alleged negligence, plaintiffs refer to the deposition of Dr. Clark A. Lin and his affidavit. Never do plaintiffs refer to page numbers in the Lin deposition nor do they reference a particular affidavit of Lin. The Court has gone the extra step of reviewing the entirety of the Lin deposition of April 22, 1991. Additionally, the Court has reviewed the May 16, 1991 affidavit of Lin which was attached to one of plaintiffs' responsive memoranda. In reviewing the materials submitted by the City in support of its motion, the Court discovered an earlier affidavit of Lin dated December 10, 1990. Plaintiffs did not direct the Court's attention to that particular affidavit. If there are any other affidavits of Lin, the Court is unaware and no further specific affidavits have been referenced.

Construing the December 10, 1990 and May 16, 1991 affidavits and the Lin deposition in a light most favorable to plaintiffs, the following can be inferred: defendants were negligent in failing "to employ a program of maintenance and

inspection to insure that the pipes are kept clean." [1] At times Lin used the terms "maintenance" and "inspection" interchangeably, but it is clear that a regular "program" of inspection would be either the precursor to or a part of maintenance. As such, it is subject to either the applicable statutory provision immunizing government conduct relating to inspections or failures to inspect or is the result of a policy decision not to have a regular program for inspection and maintenance and thus entitled to discretionary immunity. Under either scenario, defendants' claimed negligence due to failure to inspect and maintain is within the legislated governmental immunity. See, Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp., supra.

There is some testimony from him that the use of a dragline was not good engineering practice. The only consequence flowing from this to which Lin testified was that it complicated augering, delayed augering for some indeterminant period and reflected panic management. Even assuming the use of the dragline was negligent, there is no admissible evidence that such use caused any damage.

---

[1] December 10, 1990 affidavit, paragraph 11. Substantially the same statement is repeated in paragraph 12 and in the May 16, 1991 affidavit, paragraph 12.

The Court can find no reference in the Lin affidavits or the Lin deposition to the preference for a 48 inch auger over a 12 inch auger or to the use of fire hoses to clean debris. Furthermore, while the December 10 affidavit suggests it is not good engineering practice to utilize blasting for debris removal, there is no evidence of how blasting caused plaintiffs' damage. Consequently, defendants' alleged negligence due to the method of augering and use of fire hoses and a causative link between blasting and plaintiffs' damage have no evidentiary support.

The sole remaining factual issue submitted by plaintiffs involves the allegation that the defendants were negligent in interrupting the flow by capping the inlet pipe. There is but one reference to this in the testimony of Lin. This occurs in paragraph 14 of the May 16 affidavit. There Lin suggests the consequence of the capping was that the pipe thereafter became plugged. Throughout his deposition, however, he steadfastly testified that the pipe became plugged before the flood. (Lin deposition, pp. 12, 13, 18, 22). Moreover, in the deposition he testified that his claim of negligence related to pre-flood conduct. (Lin deposition, pp. 31-32). The affidavit reference to the capping of the inlet pipe is at best oblique.

Furthermore, there is no factual basis for the premise that the pipe became plugged after the flood began and plaintiffs' expert denies the premise.

The above analysis indicates that there is no genuine issue of material fact concerning each of the alleged theories of negligence. Additionally, the Court is further persuaded that plaintiffs have not demonstrated a duty owed to them sufficient to overcome the showing necessitated by Feree v. State, 784 P.2d 149 (Utah 1989). Such a showing is particularly necessary in a case such as this where the claimed injury is not the inundation of property but the loss of business revenues due to the difficulties of consumer ingress and egress. Defendants are therefore entitled to Summary Judgment. This determination renders moot the City's request for sanctions and plaintiffs' Motion to Amend Complaint.

The City's motion for contempt is denied. The allegations of unprofessional and unethical conduct are not within the Court's contempt powers. If counsel believes there has been a breach of the governing rules of conduct, referral should be made to the Utah State Bar.

Dated this 4th day of September, 1991.

MICHAEL R. MURPHY
DISTRICT COURT JUDGE

ROGER F. CUTLER #0791
Salt Lake City Attorney
BRUCE R. BAIRD #0176
Assistant City Attorney
Attorneys for Defendants
451 South State, Suite 505
Salt Lake City, Utah 84111
Telephone: (801) 535-7788

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ROCKY MOUNTAIN THRIFT STORES, INC., d/b/a HOPE OF AMERICA THRIFT STORE, et al., Plaintiffs, vs. SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah, et al., Defendants.	SUMMARY JUDGMENT IN FAVOR OF SALT LAKE CITY AND SALT LAKE COUNTY, AND CERTIFICATE OF SERVICE Civil No. C83-6678 Judge Michael R. Murphy

The following identified motions came on regularly for hearing and oral argument before the Honorable Judge, Michael R. Murphy, on the 3rd day of June 1991 at the hour of 9:00 o'clock a.m.; to-wit: Salt Lake City's Motion for Summary Judgment and Motion for Rule 37 Discovery Sanctions, dated on or about May 9, 1991; Salt Lake County's Motion for Summary Judgment, dated May 15, 1991; and Salt Lake City's Motion for Contempt, dated May 3, 1991. Also pending before the Court was the plaintiffs' motion to amend its complaint dated April 22, 1991, which motion was not noticed by the plaintiff for hearing, but was included in the City's Notice of Hearing and Notice of Oral Argument as an optional matter for Court consideration. The motion to amend was

not orally argued on June 3, 1991 or requested to be so argued by the plaintiff.

Salt Lake City was present through the appearance of its counsel of record, Roger F. Cutler. Salt Lake County was present through representation of its attorney of record, Kevan F. Smith. The plaintiffs were represented by their attorneys of record: Wesley F. Sine and Marcus G. Theodore.

The Court having heard the oral arguments of counsel and being fully advised in the premises took the matters under advisement. It independently reviewed the written memoranda submitted by the respective counsel and, independently, reviewed the matters of record as indicated in its memorandum decision. Having been fully advised in the premises, the Court entered its written Summary Decision and Order, dated September 4, 1991, and based thereon

HEREBY ORDERS, ADJUDGES AND DECREES as follows:

1. Salt Lake City's Motion for Summary Judgment should be and the same is hereby granted; all of plaintiffs' claims against said defendant are dismissed, with prejudice.

2. Salt Lake County's Motion for Summary Judgment should be and the same is hereby granted; all of plaintiffs' claims, against Salt Lake County are dismissed with prejudice.

3. Salt Lake City's Motions for Rule 37 Sanctions and Contempt are denied.

4. The plaintiffs' Motion to Amend its Complaint is denied.

5. The defendants, Salt Lake City and Salt Lake County, are

awarded their costs, pursuant to law.

DATED this 1st day of October, 1991.

BY THE COURT:

Michael R. Murphy

MICHAEL R. MURPHY
Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed copies of the foregoing by U.S. mail, postage prepaid, this 10th day of September, 1991, to the following:

Anne Swensen
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Kevan F. Smith
Deputy County Attorney
2001 South State Street, No. S-3600
Salt Lake City, Utah 84190-1200

Paul J. Toscono
Trustee Rancho Lanes
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, Utah 84111

Kimball R. Mosier
Trustee Sine Investments
8 East 300 South, Suite 520
Salt Lake City, Utah 84145

Wesley F. Sine
349 South 200 East, Suite 170
Salt Lake City, Utah 84111

Marcus G. Theodore
466 South 500 East
Salt Lake City, Utah 84102

RFC:cc

[redacted]